Trials@uspto.gov
571-272-7822

Paper 36
Entered: March 5, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ARRIS GROUP, INC.,
Petitioner,

v.

TQ DELTA, LLC,
Patent Owner.

Case IPR2016-01160
Patent 8,611,404 B2

Before SALLY C. MEDLEY, TREVOR M. JEFFERSON, and MATTHEW R. CLEMENTS, *Administrative Patent Judges*.

CLEMENTS, *Administrative Patent Judge*.

DECISION
Denying Petitioner's Request for Rehearing
37 C.F.R. § 42.71

I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.71(d), ARRIS Group, Inc. ("Petitioner") requests rehearing of our Final Written Decision (Paper 34, "Dec."). Paper 35 ("Req. Reh'g"). Specifically, Petitioner submits that we erred by not considering evidence and arguments regarding "synchronization signal" and, as a result, denied Petitioner an opportunity to show that the references teach the claimed "synchronization signal" under the claim construction adopted in our Final Written Decision. Req. Reh'g *passim*.

For the reasons set forth below, Patent Owner's Request for Rehearing is *denied*.

II. STANDARD OF REVIEW

A party requesting rehearing bears the burden of showing that the decision should be modified. 37 C.F.R. § 42.71(d). The party must identify specifically all matters we misapprehended or overlooked, and the place where each matter was addressed previously in a motion, an opposition, or a reply. *Id.* With this in mind, we address the arguments presented by Patent Owner.

III. ANALYSIS

A. Background

In our Decision on Institution, we adopted Petitioner's proposed construction of "synchronization signal" to mean "a signal allowing frame synchronization between the transmitter of the signal and the receiver of the signal." Paper 8, 6; Paper 1 ("Pet."), 24. Patent Owner, in its Response, argued that "synchronization signal" should not encompass a "synchronization frame," which allows for frame synchronization, because

the claims separately recite a "synchronization frame." Paper 16 ("PO Resp."), 21. Petitioner, in its Reply, argued that our initial construction was correct and that, even if Patent Owner's construction was adopted, it was nevertheless taught by Vanzieleghem[1] and ANSI T1.413.[2] Paper 17 ("Reply"), 8–9, 18–19. In our Final Written Decision, we agreed with Patent Owner that "synchronization signal" does not encompass a synchronization frame and we construed "synchronization signal" to mean "a signal allowing synchronization between the clock of the transmitter of the signal and the clock of the receiver of the signal." Dec. 6–10. With respect to whether Petitioner had met its burden of showing that the "synchronization signal" was taught in the prior art, we stated

> The contentions in the Petition are based upon Petitioner's proposed construction of "synchronization signal" as encompassing a synchronization frame—i.e., "allowing for frame synchronization." *See*, *e.g.*, Pet. 24, 37–38. We have not adopted that construction, however, for the reasons discussed above. Because our construction of "synchronization signal" excludes a synchronization frame, we are not persuaded that the argument and evidence in the Petition shows that the combination of Bowie, Vanzieleghem, and ANSI T1.413 teaches transmitting/receiving, in full power mode, a "synchronization signal." Moreover, we agree with Patent Owner that Petitioner's reliance, in the Reply, upon the teachings of a pilot tone in Vanzieleghem and ANSI T1.413 constitutes a change in theory and, therefore, is beyond the scope of a proper reply. Notwithstanding the mention of "a pilot tone" in paragraph 58 of

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[1] U.S. Patent No. 6,246,725 B1; issued June 12, 2001 (Ex. 1006) ("Vanzieleghem").

[2] *Network and Customer Installation Interfaces – Asymmetric Digital Subscriber Line (ADSL) Metallic Interface*, AMERICAN NATIONAL STANDARDS INSTITUTION (ANSI) T1.413-1995 STANDARD (Ex. 1009) ("ANSI T1.413").

> Dr. McNally's declaration, the Petition itself unambiguously identifies the synchronization frame, not a pilot tone, as the recited "synchronization symbol." *See, e.g.*, Pet. 37–38 (citing Bowie's and ANSI T1.413's teachings of synchronization frame). We, therefore, do not address whether the pilot tone taught in Vanzieleghem and in ANSI T1.413 teaches the recited "synchronization signal."

Dec. 15–16.

B. Petitioner's Arguments

Petitioner argues that we "erred as a matter of law in failing to address whether the pilot tone taught in Vanzieleghem and in ANSI T1.413 teaches the 'synchronization signal' recited in the '404 patent in view of the claim construction ultimately adopted by the Board in the Final Written Decision." Req. Reh'g 2.

First, Petitioner argues we should consider whether the pilot tone teaches the "synchronization signal" because Patent Owner admitted in its Preliminary Response that "the ''pilot tone' of Vanzieleghem is sent out periodically to maintain synchronization between the transmitter and receiver." *Id.* (quoting Paper 7, 30); *see also id.* at 4 ("This admission, however, was not addressed or even mentioned in the Final Written Decision."). Petitioner did not present this argument previously. We could not have overlooked or misapprehended those arguments presented for the first time in the rehearing request. Moreover, even assuming the alleged admission is true, it is not relevant to the issue of whether Petitioner's reliance, in the Reply, upon the teachings of a pilot tone in Vanzieleghem and ANSI T1.413 constituted a change in theory from the Petition and, therefore, was beyond the scope of a proper reply.

Second, Petitioner argues that it appropriately addressed the pilot tone in the Reply and we "erred in deeming the discussion in the Reply that the 'pilot tone' of Vanzieleghem and ANSI T1.413 teaches the claimed 'synchronization signal' as being 'beyond the scope of a proper reply.'" Req. Reh'g 3–5. Specifically, Petitioner argues that its discussion was properly the subject of the Reply because "[t]he Federal Circuit has recognized that when a patent owner argues for a claim construction in its PO Response, a petitioner can and should 'present a case for unpatentability under that construction when it ha[s] the opportunity, in its Reply.'" *Id.* at 5 (citing *Rovalma, S.A. v. Bohler-Edelstahl GmbH & Co. KG*, 856 F.3d 1019, 1029 (Fed. Cir. 2017). The quoted passage in *Rovalma* states

> in this case, unlike in *SAS Institute*, the petitioner had clear notice that the Board might adopt the claim construction ultimately adopted—that construction was argued in the Patent Owner's Response—yet it did not present a case for unpatentability under that construction when it had the opportunity, in its Reply.

Rovalma, S.A., 856 F.3d at 1029. Here, as in *Rovalma*, Petitioner had clear notice that we might adopt a claim construction excluding synchronization frame because Patent Owner argued for such a construction in its Patent Owner Response. PO Resp. 19–23. And though the *Rovalma* decision faults Petitioner for not "present[ing] a case for unpatentability under that construction when it had the opportunity, in its Reply," it does not say what Petitioner's suggest—i.e., that petitioners may, in their replies, abandon completely the teachings relied upon in the petition and point to an entirely different teaching within a reference. Instead, *Rovalma* merely observes that where, as here, Petitioner has notice of a dispute over the construction of a term, it should, in its Reply, argue why the evidence relied upon in the

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